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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1124

NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION OF THE DISTRICT OF COLUMBIA, a corporation, and AETNA CASUALTY AND SURETY COMPANY, a corporation, *Petitioners*,

v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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v.

THEODORE BRITTON, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioners, National Homeopathic Hospital Association of the District of Columbia, a corporation, and Aetna Casualty and Surety Company, a corporation, seeks to have reviewed by this Honorable Court a decision of the United States Court of Appeals for the District of Columbia in a case which arose under the Longshoremen's and Harbor Workers' Compensation Act as applied to the District of

Columbia, U. S. C. Supplement 2, Title 33, ch. 18; 44 Stats. 1424; 45 Stats. 600.

This is a compensation case and was tried before Theodore Britton, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, in this City.

Briefly the facts in this case, which will be set out in more detail later, but which are mentioned here to give a proper understanding of the case, involves one Frank Tyler, who fell in the course of his work and fractured his right knee cap, which knee cap had been previously injured as the result of a previous fall, not connected with his work, and which left him with a permanent partial disability of the right leg. Years before Tyler had lost his left leg at the knee as the result of a railroad accident, and he had also lost his left arm at its surgical neck as the result of another injury. Notwithstanding the previous injuries received by this claimant, namely, the permanent partial disability of the right leg as the result of a fall in January, 1942 while at home and which was not compensable, the loss of the left leg at the knee, and the loss of the left arm, the deputy commissioner, respondent in this case, refused to rate this case under the provisions of section 908 (f) of the Compensation Act in effect in the District of Columbia, hereinafter quoted, but did rate the man as being permanently and totally disabled and based his rating upon the claimant's earning capacity at the time of the fall, holding that the said prior amputations of the lower left leg and left arm, and the condition of the right patella were not industrial injuries and therefore were not previous disabilities within the meaning of section 908 (f) of the Compensation Act. As a result of this decision of the deputy commissioner the petitioners were ordered to pay compensation for total permanent disability whereas if the case had been determined under section 908 (f) of the Compensation Act the petitioners would only be liable to pay for the last injury and the difference between that and total permanent

disability would be paid out of a government fund as provided in said section 908 (f).

Your petitioners, under the provisions of section 921 of the Longshoremen's and Harbor Workers' Compensation Act, as applied to the District of Columbia, brought suit by bill of complaint in the District Court of the United States for the District of Columbia, to set aside the award on the allegation that the deputy commissioner's decision was not in accordance with law. The respondent filed a motion to dismiss petitioners' complaint and the motion to dismiss was granted and an order dismissing the bill of complaint of petitioners was entered, from which order petitioners appealed to the United States Court of Appeals for the District of Columbia. The United States Court of Appeals for the District of Columbia, by a majority opinion, affirmed the award of the deputy commissioner and the decision of the lower court, with Chief Justice Groner dissenting.

It is this decision (R. 59 to 66) which petitioners seek to have reviewed.

The reasons given by the United States Court of Appeals for the District of Columbia by the majority, in supporting the deputy commissioner's award, will be commented upon in detail later on in this brief, and it is not deemed necessary to recite these reasons at this time.

STATEMENT OF THE FACTS.

The record of the testimony developed before the deputy commissioner at the formal hearing held by him on August 19th, 1943 in this case disclosed the following facts:

Frank Tyler, a colored claimant, was 61 years of age in August, 1943 (R. 16). He went to work for the National Homeopathic Hospital in this City as an elevator operator about twenty-seven years ago. At the time he started to work for this Hospital his disabilities due to previous injuries were as follows: His left lower leg was amputated

two and a half inches below the knee. This accident occurred when he was a child as the result of a railroad train running over his left lower leg (R. 21). During the year 1915, or about one year before he came to work for the National Homeopathic Hospital, he was attacked by a man who struck him on the left arm with a stick, as the result of which his left arm was amputated at its surgical neck (R. 20, 21) so that at the time he came to work at the Hospital his left lower leg was missing to a point two and a half inches below the knee and he was minus his left arm. In January, 1942 this claimant, fell, while at home, receiving a fracture of the right patella and a rupture of the rectus femur tendon (R. 50). This fracture was repaired by an open reduction, the tendon was fixed with a bone peg and he was treated by Dr. Robinson from the date of his injury on January 19th, 1942 until April 15th, 1942. Dr. Robinson thought that he would be able to get back to work about May 1st, 1942, and stated, in his opinion, this injury would result in permanent disability and in limited use of the right limb (R. 49, 50). Prior to this injury in January, 1942, the claimant occasionally used a cane but never a crutch. After the injury of January, 1942 he went back to work with a crutch on the 1st of June, 1942. On July 8th, 1942 he fell while at work as the result of his crutch slipping (R. 17) and he received a comminuted fracture of the right patella (R. 46), which necessitated the removal of the knee cap and left him with an unstable condition of the right leg. How much of this unstable condition was caused by the permanent residuals of the injury received in January, 1942, and the second injury in July, 1942, was not definitely set forth in the record made in this case, although it is clear from the record that he had a permanent partial disability from the said injury of January, 1942.

Dr. Custis Lee Hall, orthopedic surgeon in this city testified that he examined the claimant on April 6th, 1943 and that the man had a 45 per cent permanent partial loss of

use of the right leg (R. 24) and that he recommended a certain type of operation which would improve the claimant's right leg condition about 50 per cent from what it was at that time (R. 25).

Dr. John A. Talbot, orthopedic surgeon in this city, gave the same rating on the permanent loss of use of the claimant's right leg as did Dr. Hall (R. 28).

The deputy commissioner called Dr. J. M. Brown, who was the doctor for the District of Columbia Compensation Commission (R. 39, 40, 41, 42, 43, 44). He testified that he did not specialize in orthopedic surgery and was just an ordinary doctor. He testified that he considered that claimant's right leg was an insecure prop and when pressed as to the percentage of disability that he had in his right leg stated that it was a little better than an amputated leg. He further testified in answer to the deputy commissioner's questioning that considering the loss of the claimant's left leg and his left arm, together with the injury sustained on July 8th, 1942, that the claimant had a total disability as to working capacity. No mention was made in the deputy commissioner's questioning of Dr. Brown about the permanent partial disability suffered by the claimant as the result of the injury of January, 1942. Dr. Brown stated on cross-examination he could not answer the question as to the percentage of permanent disability the claimant had to his right leg as a result of the injury of January 19th, 1942 because he did not see the leg at that time.

Dr. Edgar A. Bocock's report as superintendent of Gallinger Hospital was offered in evidence (R. 45, 46) covering the injury that claimant received on July 8th, 1942. This report stated that whether the injury would result in a permanent defect was unknown; that the claimant was discharged from the hospital on August 20, 1942, but on being asked as to the date the claimant would be able to do any work stated that he would probably require four weeks further convalescence.

The report of Dr. Henry S. Robinson (R. 49, 50) attending physician to the claimant while he was confined in Freedmen's Hospital for the injury of January 19th, 1942 stated that as a result of the injury received on that date that the patient would have a limited use of the right limb and that it was a permanent defect.

QUESTION PRESENTED.

The question in this case is whether the United States Court of Appeals for the District of Columbia erred in interpreting section 908 (f) of the Longshoremen's and Harbor Workers' Compensation Act as applied to the District of Columbia in the majority opinion rendered in this case thereby affirming the Deputy Commissioner's Award and Findings of Fact.

When this Act was passed by Congress the Sections were numbered from One to Fifty-one. When the Act was placed in the U. S. Code the Sections were numbered beginning with 901 to 951. All the citations in this petition follow the numbering of the United States Code.

Section 908 (f) of this Act reads as follows:

> "Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury; Provided, however, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44."

The Court in its majority opinion states that the word "injury" as used in line one and two of the above quoted section is to be given the meaning in its definition in Sec-

tion 902 (2) of the Act hereinafter quoted, and the words "previous disability" in line four of the above quoted section is to be given the meaning of those words as defined in section 902 (10) of the Act hereinafter quoted. The Court in its majority opinion concedes that if these words were used in their ordinary sense petitioners' contention would be correct, but it states they were used in special senses which were defined under the Act.

Following out this theory of reasoning the majority opinion of the Court concluded that the three previous permanent partial injuries suffered by the claimant consisting of the loss of his lower left leg from the knee down, the loss of his left arm at its surgical neck, and the permanent partial disability of the right leg, not having been caused by accidental injuries incurred in the course of previous employments, could not be considered as injuries or previous disabilities under said Section of the Act.

The Court also in its opinion states that the interpretation of the Section in question as contended by petitioners would soon exhaust the special fund mentioned in said section, and therefore would destroy the purpose of the Act.

Petitioners contend that the hearings before the Committee in Congress clearly show that the above mentioned words were to be given their ordinary meaning, that the words are so plain when considered with the purpose to be effected that no other fair construction can be given to them, and that the instant case is one of the types which Congress had in mind when the Act was passed so as to give relief to an employer where he had employed a man suffering from permanent partial disability or permanent partial disabilities received from accidental injuries.

Petitioners' contentions on the question presented are ably supported by Chief Justice Groner's dissenting opinion in this case (R. 62-66).

JURISDICTION.

Jurisdiction to issue the writ prayed for is conferred upon this Honorable Court by Sec. 240-A of the Judicial Code as amended.

The following points are submitted as being substantial grounds for granting the petition and issuing the Writ:

1. Sec. 240-A, Stat. 938, U. S. C. Title 28, sec. 347 (a).

2. The case comes directly within the scope of Rule 38 (5) (c) of this Honorable Court in that the United States Court of Appeals for the District of Columbia has decided a question of general importance involving construction of a statute of the United States, which has not been, but should be settled by this Honorable Court. This Court has previously granted Certiorari in a case involving construction of this Act on the ground of its general importance. See the case of *Del Vecchio et al*, v. *Bowers*, 56 S. C. Rep. 190; 296 U. S. 280, wherein this Court said:

> "We will not ordinarily review decisions of the United States Court of Appeals which are based upon Statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope and a decision with respect to its enforcement constitutes a precedent of general application. We, therefore, granted the Writ because of the important question as to the effect of Section 20 (d). * * * "

This question is of general importance for the reason that no doubt after the present war is over there will be a large number of men seeking employment who have lost eyes or limbs, and the very reason for the inclusion in the Compensation Act of Section 908 (f) as explained by the spokesman for labor at the Congressional hearings, hereinafter set forth, will be nullified by the majority opinion of the United States Court of Appeals for the District of Columbia in this case.

Wherefore, petitioners respectfully pray that a Writ of Certiorari be issued out of this Honorable Court directed to the United States Court of Appeals for the District of Columbia commanding it to certify to this Court for its review and determination a full and complete transcript of the record and all proceedings in case #8688, entitled on its docket "National Homeopathic Hospital Association of the District of Columbia, a corporation, and Aetna Casualty and Surety Company, Inc., a corporation, v. Theodore Britton, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission;" and that the judgment entered in said cause by the United States Court of Appeals for the District of Columbia may be reversed; and for such other and further relief as to the Court may seem meet and proper.

James E. McCabe,
Counsel for Petitioners National Homeopathic Hospital Association, a corporation, and Aetna Casualty and Surety Company, a corporation.